Supreme Court, U.S.
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No. 06-985

IN THE

# Supreme Court Of The United States

LYNETTE M. PETRUSKA,

*Petitioner,*

—versus —

GANNON UNIVERSITY, et al.

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

### I. THE PETITION FOR CERTIORARI WAS TIMELY FILED

The certiorari petition was timely filed according to the Supreme Court Clerk's Office and under the Internal Operating Rules of the United States Court of Appeals for the Third Circuit. The Respondents rely on case law that is inapposite to this case. The October 18, 2006 order denying rehearing en banc is the dispositive order in this case and, therefore, the proper time from which to calculate the due date for the certiorari petition.

#### A. The Supreme Court Clerk's Office

In an abundance of caution, Petitioner communicated in some detail with the Supreme Court Clerk's Office on the timing issue significantly before filing the Petition. During a conversation with the Clerk's Office on December 28, 2006, between 11:32 and 11:40 a.m., it was confirmed that the final order from which to calculate the petition's due date was the October 18, 2006 order. Confirming this calculation, the Supreme Court's docket indicates that appeal to the Supreme Court was taken from the rehearing denial of October 18, 2006. Petitioner complied with the Clerk's Office's determination. Thereafter, on January 18, 2007, the Supreme Court Clerk's Office filed the petition as timely consistent with its previous interpretation that the Third Circuit Court of Appeals' October 18, 2006 order was the dispositive order for purposes of calculating the time for filing the Petition. *See* Supreme Court Rule 13(2).

**B. Under Third Circuit Rules, the October 3, 2006 Order Is Defective and the October 18, 2007 Order Is Dispositive**

The Third Circuit Docket shows that the October 3, 2006 order was procedurally deficient, its mandate was recalled, and the October 18, 2006 order was the basis for the relevant mandate to issue.

The plain language of the Internal Operating Procedures of the Third Circuit deems the October 18 order, and not the October 3 order, "dispositive." Under the Internal Operating Procedures of the Third Circuit, the dispositive order is that containing indication of a dissent from rehearing denial when the dissenting judge requests publication. *See* Internal Operating Procedures of the U.S. Ct. of App. for the Third Cir. R. 9.5.8 (2002) ("If there is a dissent from the denial of rehearing and no dissenting opinion is filed, a notation will be added to the dispositive order, at the affirmative request of the dissenting judge[, who has] directed its publication.").

The October 3 order contained no indication of any dissent from denial. Because only the October 18 order included notification of Judge Ambro's dissent from denial of rehearing, it was the "dispositive" order.

The mandate from the October 3, 2006 order was issued on October 11, 2006. On October 18, 2006, the mandate had to be "recalled" and reissued. The docket states, "[I]t is ordered that the mandate issued October 11, 2006 is recalled. The order denying the petition for rehearing dated October 3, 2006 failed to note, in accordance with 3d Cir. IOP 9.5.8, that Judge Ambro would grant rehearing en banc. Accordingly, the order dated October 3, 2006 will be amended to include the following statement: 'Judge Ambro would grant rehearing by the court en banc.' After the amdended [sic] order is entered, the Clerk shall issue the mandate forthwith, filed." The Amended Order was filed and the mandate

reissued on October 18, 2006. Docket #: 05-1222, *Petruska v. Gannon Univ.* (3d Cir).

The October 3 order was procedurally defective, which required the mandate to be recalled. The October 18, 2006 order cures the procedural defect and, therefore, is the relevant rehearing denial order. This is reflected in the Supreme Court's docket, which indicates that the rehearing denial was October 18, 2006. Therefore, the time for filing the petition for certiorari started on October 18, and ran 90 days. The January 16, 2007 filing occurred 90 days later and, therefore, was timely.

### C. The *Honeywell* Decision Is Inapposite

The Respondents rely upon *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), for the purpose of arguing that if there is no substantive change in a lower court's later opinion, an earlier order starts the clock running for the certiorari petition. *Honeywell*, however, is not on point. While the substantive result did not change between the Third Circuit's October 3, 2006, and October 18, 2006 orders, the procedural posture of the case changed, as discussed above. Unlike the earlier order in the *Honeywell* case, the October 3 order in this case was defective. In this case, the mandate had to be recalled and reissued, as distinct from *Honeywell*, where the mandate was unaffected between the first and second orders.

*Honeywell* further does not control this case, because the two procedural histories before the earlier orders are distinct. The Petitioner in *Honeywell* failed to file any timely rehearing petition and, therefore, this Court treated it as a case that did not involve questions regarding a rehearing petition. 344 U.S. at 210-11. In this case, Petitioner filed timely rehearing petitions following both *Petruska v. Gannon Univ.*, 448 F.3d 615 (2006) ("*Petruska I*"), and *Petruska v. Gannon Univ.*, 462 F.3d 294 (2006) ("*Petruska II*"), and the

rules for rehearing controlled. Under those rules, the October 3 order is defective, and the October 18 order serves as the basis for issuing the mandate and establishes the proper date from which to calculate the timing of the petition. As set forth above, this interpretation is supported by the Clerk filing the Petition for Writ of Certiorari at issue consistent with Supreme Court Rule 13(2), which provides that the "Clerk will not file any petition for writ of certiorari that is jurisdictionally out of time."

## II. RESPONDENTS' POINTS SUPPORT GRANTING THE PETITION

Instead of arguing the merits of granting certiorari, Respondents spend the vast majority of their Response on timeliness. With respect to the merits of granting certiorari, Respondents' short, general response does not undermine Petitioner's central point that this Court's guidance is sorely needed in this area of the law. Contrary to Respondents' intent, their reference to this Court's denial of certiorari in recent cases supports the conclusion that such cases will continue to come to this Court until there is adequate clarification, particularly in light of *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in which this Court held that neutral laws of general applicability (like Title VII) are applicable to religious entities. *See* Respondents' Joint Brief in Opposition to Petition for Writ of Certiorari at 11.

Respondents also fail to rebut the fact that there is confusion in this important First Amendment arena -- where this Court never has provided guidance despite over thirty years of precedent in the lower courts. Both of the cases that Respondents cite as recently "reaffirm[ing] the ministerial exception," Respondents' Joint Brief at 10, reaffirm only the

overbroad interpretation of the ministerial exception that completely bars employment discrimination and retaliation claims against religious and religiously-affiliated employers. *See generally Boggan v. Miss. Conference of the United Methodist Church*, 2007 WL 412044 (5th Cir. 2007) (unpublished); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007).

The Respondents further provide no response whatsoever to the lack of uniformity in the lower courts regarding whether a religious employer can waive or lose the purported "ministerial exception" by expressly representing itself as an "equal opportunity" employer and/or by accepting federal funds conditioned on nondiscrimination. The propriety and scope of the "ministerial exception" remains an important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

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